

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

LONNIE CLEMENTS ENCALADE,)	
Institutional ID No. 797424,)	
SID No. 02360082,)	
Prior TDCJ ID Nos. 339294 and 571283,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO.
)	1:10-CV-00196-C
BRAD LIVINGSTON, <i>et al.</i> ,)	
)	
Defendants.)	ECF

ORDER

Plaintiff Lonnie Clements Encalade, acting *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 against the Defendants, Brad Livingston, Director of the Texas Department of Criminal Justice ("TDCJ"), and FNU Wheeler, Warden of the TDCJ Robertson Unit. Plaintiff alleges that Defendants were deliberately indifferent to his safety after he was threatened by another inmate and were deliberately indifferent to his health when he was incarcerated for 72 hours in a non-airconditioned prehearing detention cell for safekeeping. Plaintiff seeks declaratory relief and transfer to a safe-keeping unit. Plaintiff was granted permission to proceed *in forma pauperis* by Order dated September 16, 2010.

The complaint was transferred to the docket of the United States Magistrate Judge, who ordered authenticated copies of Plaintiff's prison records that were relevant to the complaint and notified authorities that a hearing pursuant to *Spears v. McCotter*, 766 F.2d 179, 181-82 (5th Cir. 1985), would be scheduled in the near future. The Magistrate Judge conducted a *Spears* evidentiary hearing on November 9, 2010, and Plaintiff testified under oath.

Because Plaintiff did not consent to proceed before the United States Magistrate Judge, the Magistrate Judge entered a Report and Recommendation and transferred the case back to this Court on November 15, 2010. Plaintiff filed objections to the Report and Recommendation on November 19, 2010.

This Court has made an independent examination of the pleadings and the record in this case, listened to the audiorecording of the *Spears* evidentiary hearing, and finds that Plaintiff's objections should be overruled and the Magistrate Judge's findings and conclusions should be ADOPTED.

It is, therefore, **ORDERED**:

- (1) Plaintiff's Objections dated November 19, 2010, are overruled.
- (2) For the reasons set forth in the Magistrate Judge's Report and Recommendation dated November 15, 2010, the instant civil rights action is DISMISSED with prejudice pursuant to 28 U.S.C. § 1915(e)(2) and 42 U.S.C. § 1997e.
- (3) This dismissal shall count as a qualifying dismissal under 28 U.S.C. § 1915 and *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1996).
- (4) The dismissal of Plaintiff's complaint does not release Plaintiff or the institution where he is incarcerated from the obligation to pay any filing fee previously imposed. *See* 28 U.S.C. § 1915(b)(1) ("Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner **shall be required to pay the full amount of a filing fee.**") (emphasis added); *Hatchet v. Nettles*, 201 F.3d 651, 654 (5th Cir. 2000) ("No relief from an order directing payment of the filing fee should be granted for a voluntary dismissal.").
- (5) Plaintiff is advised that if he appeals this Order, he will be required to pay the appeal fee of \$455.00 pursuant to the PLRA, and he must submit an application to proceed *in forma*

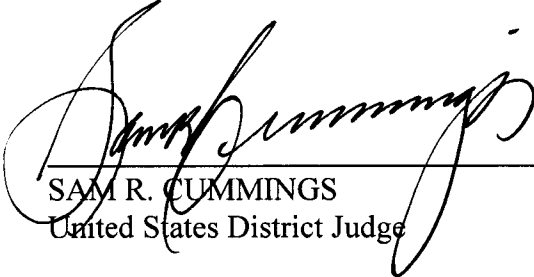
pauperis and a 6-month Certificate of Inmate Trust Account at the same time he files his notice of appeal.

(6) Any pending motions are DENIED.

Judgment shall be entered accordingly.

A copy of this Order shall be mailed to the Office of General Counsel, TDCJ-ID Litigation Support, P.O. Box 13084, Austin, Texas, 78711 and to TDCJ Local Funds Division, P.O. Box 629, Huntsville, Texas 77342-0629.

Dated March 12, 2012.



SAM R. CUMMINGS
United States District Judge